generally, however, have considered that, even though the privilege may at times be abused, yet public policy requires that judicial investigations should not be hampered by fears of groundless libel suits against those involved in the proceedings. On the whole the latter view seems preferable. Accordingly the principal case appears sound in bringing Tennessee into line with other jurisdictions.

TRUSTS — DISTINCTION BETWEEN PERSONAL AND REPRESENTATIVE CAPACITY OF TRUSTEE. — *Held*, that a judgment in a foreclosure suit against a party not described as a trustee does not prevent him from setting up in a subsequent action a claim as trustee to the property in question. *Farmers' Loan and Trust Co.* v. *Essex*, 71 Pac. Rep. 268 (Kan.).

In an action brought for the assessment of taxes upon lands owned by the defendant, she was described as "trustee of A. H." The land was in fact owned by the defendant in her own right. *Held*, that taxes may be assessed against the land in the present action, for the reason that the words "trustee of A. H." are merely descriptive, and consequently the defendant is present in her individual capacity. *Commonwealth* v. *Hamilton*, 72 S. W. Rep. 744 (Ky.). See NOTES, p. 588.

BOOKS AND PERIODICALS.

DISEASE OF DEFENDANT AS DEFENSE TO ACTION ON CONTRACT TO MARRY. — In a recent article some space is given to a discussion of venereal disease in defendant as a defense to an action for breach of promise to marry. *Venereal Disease in the Law of Marriage and Divorce*, by Charles Henry Huberich, 37 Am. L. Rev. 226 (March-April, 1903). The difficulties of the question are in part suggested, but no explanation is attempted. The writer does little more than cite extracts from one English and two American cases, which he seems to consider the entire law on the subject.

The author's discussion is involved in the broader question as to how far disease in general in a party to a contract of marriage will justify his refusal to perform. The possible cases would seem to fall into two general classes. In the first would come cases where the disease materially affects the health of defendant, the party refusing to perform, without making sexual intercourse dangerous to either party or impossible. In these cases there would seem to be no defense. Such a change in defendant's health may be imagined as would excuse plaintiff from performing, but, if the latter is willing, the defendant, it would seem, must perform or pay damages. In the second class would fall cases in which the disease would render intercourse dangerous to one party or impossible. In this class it will be convenient to make four subdivisions.

(*a*) The existence of such disease may be known to defendant at the time of contract, but he may have had reasonable ground to believe that it could easily be cured. In this case there would seem to be a valid defense provided the court would protect him were the disease unknown, as in subdivision (*d*). See *Allen* v. *Baker*, 86 N. C. 91.

(*b*) But there may be no reasonable ground for believing that the disease is temporary in its nature, and in this case, on the analogy of the cases in which a married man is held liable when he contracts to marry a single woman, there would seem to be no defense. *Cf. Kelley* v. *Riley*, 106 Mass. 339.

(*c*) Where such disease does not exist at the time of contract but its subsequent appearance is due to defendant's fault, there would seem to be no ground for a defense.

(*d*) But the disease may appear without any fault on defendant's part, and this is the form in which the question has generally been presented to the courts. The earliest case is *Hall* v. *Wright*, 1 E. B. & E. 746. There, after the contract, defendant became afflicted with a "bleeding at the lungs" making intercourse dangerous to him. It was held to be no defense. The Supreme

Court of Virginia reached a contrary result in *Sanders* v. *Coleman*, 97 Va. 690. There are also three American cases allowing the defense, where the disease was venereal. *Allen* v. *Baker*, 86 N. C. 91; *Shackleford* v. *Hamilton*, 93 Ky. 80; *Gardner* v. *Arnett*, 21 Ky. L. Rep. 1. Mr. Huberich seems to think that a distinction might be taken between venereal disease and other diseases, and that the English courts would allow the defense in the former case; but this seems at least doubtful. The decision in *Hall* v. *Wright* was based on two grounds: (1) that performance was not rendered impossible, and (2) that, even if it was impossible as to part, defendant could still give plaintiff the benefit of his social position. Both grounds seem equally applicable to venereal diseases. In case of such a disease as in *Hall* v. *Wright*, intercourse would be dangerous to defendant's own life, while venereal disease would endanger the life of plaintiff and the health of the offspring. Public policy might be stronger in the latter case, but it would be against the union in both. A recent New Jersey case seems to indicate that such a distinction as the writer suggests would not be taken. The disease was not venereal, but the court in a *dictum* carry the doctrine of *Hall* v. *Wright* to its logical conclusion and repudiate the North Carolina and Kentucky cases. *Smith* v. *Compton*, 58 L. R. A. 480.

The real question in all the cases would seem to be as to the true meaning of the contract. In contracts for personal services incapacity either of body or mind is an excuse for not performing. *Robinson* v. *Davison*, L. R. 6 Ex. 269. It would seem that the conditions implied in ordinary personal contracts should be extended rather than restricted in a contract so thoroughly personal in its nature as the marriage compact. To every contract of marriage might well be coupled the implied condition that a refusal to perform shall be justifiable if the situation of the parties has so changed, without fault on the part of defendant, that a consummation of the married state would be impossible or would endanger the life of either. This would seem to be the correct doctrine. It is in accord with the intention of the parties and is applicable to diseases of all kinds.

A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS. By John W. Daniel. Fifth Edition. By John W. Daniel and Charles A. Douglass. New York: Baker, Voorheis & Company. 1903. 2 vols. pp. cliv, 933; x, 1004. 8vo.

To sound a discordant note in a chorus of praise is no pleasant duty. An examination of this work, however, convinces us that as there is a good deal of "law taken for granted," so here is a case of merit too freely conceded. It seems to be the fashion for writers of the perfunctory reviews of new editions of well-known law books to style them "legal classics." If all that is necessary to earn that title is to have a successful sale, to pass through several editions, and to be often cited by courts, then this book may be called a "legal classic." But if sound and scientific discussions of principles, accurate statements of the cases, and correct citations are essential to a "legal classic," then this work does not seem to us to deserve that name. We confess that we had ourselves been rather in the habit of taking the merit of the book for granted, and we have been surprised, as a result of a careful examination for the purpose of this review, to find how greatly we were mistaken.

The author, it is true, is more independent than is usual with the writers of legal text-books in the expression of opinion, whether in approving or in dissenting from the decisions of the courts, and this is a commendable feature of his work. But the value of an author's opinions depends largely on the reasons which he gives for them, and in this respect we do not find Mr. Daniel strong. He presents and defends his theories, not like a judge, but rather as an advocate holding a brief, often citing cases which only by a sort of twist can be made to seem favorable to his theories, and ignoring cases which are adverse to them. It is impossible within reasonable space to give more than a few instances.